No. 77-1127

In the Supreme Court of the United States

OCTOBER TERM, 1977

STERLING JACK BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on one count of receiving an illegal kickback, in violation of 41 U.S.C. 51 and 54. He was sentenced to two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. 1a).[1]

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[1]On February 27, 1978, petitioner, who had been free on bond pending appeal, filed an application for stay of the court of appeals' mandate pending final disposition of his petition for a writ of certiorari. On March 1, 1978, Mr. Justice Powell ordered a temporary stay pending receipt of the government's response. That response, which embodied this Memorandum in Opposition, was filed on March 8, 1978 and Mr. Justice Powell vacated the stay and denied the application for a stay on March 9, 1978.

STATEMENT

The evidence at trial showed that petitioner was employed as a section manager in charge of area engineering at the Ingalls Ship Building Company ("Ingalls") (Tr. 283). Ingalls held a prime contract from the United States for construction of destroyers for the Navy. On August 26, 1975, petitioner met with Frank Irwin, the general manager of P & D Tool and Die Company ("P & D Tool") to discuss a subcontract for production of special wrenches necessary for construction of the destroyers (Tr. 102-103). Petitioner told Irwin that P & D Tool would get a subcontract if Irwin agreed to kick back "$4,080 for [petitioner] and his people," and that contracts would be awarded in the future in return for three percent kickbacks (Tr. 108-109).

Irwin notified his superiors and was instructed to pretend to go along with petitioner's proposal (Tr. 111-112). As a result, P & D Tool was awarded the subcontract and Irwin agreed to meet petitioner for payment of the kickback. At a meeting on October 15, 1975, petitioner received $2,040 in marked bills from Irwin. The two also discussed the possibility of providing other contracts for P & D Tool. A microphone and transmitter had been concealed on Irwin, and this conversation was recorded by surveilling police officers. Petitioner was arrested on the scene (Tr. 111-113, 125-128, 189-190).

ARGUMENT

The issues that petitioner has raised are insubstantial and review by this Court is inappropriate.

1. Relying principally on *United States* v. *Perry*, 431 F. 2d 1020 (C.A. 9), petitioner contends (Pet. 7) that the "Anti-Kickback Act" (41 U.S.C. 51-54)[2] is "ambiguous." *Perry* was a civil action for recovery of alleged kickbacks and involved a motion for summary judgment submitted on affidavits. The court of appeals held that in light of the "totally inadequate factual record" in that case, the court could not determine whether payments described in the affidavits between two subcontractors were "normal trade practices" or "inducements" or "acknowledgements"

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[2]41 U.S.C. 51 provides, in relevant part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgement of a subcontract or order previously awarded, is prohibited. * * *

41 U.S.C. 52 provides, in relevant part:

> * * * [T]he term "subcontractor" is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder * * *.

41 U.S.C. 54 provides:

> Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

forbidden by the statute. 431 F. 2d at 1021-1023. The court of appeals vacated the summary judgment, preferring not to decide the issues presented "in the absence of the light that may be shed by a factual record developed at trial." *Id.* at 1023. Here, by contrast, a trial has been held and the record clearly reveals that petitioner's payment from Irwin was an "inducement" or "acknowledgement" directly related to the awarding of a contract. Indeed, petitioner makes no claim to the contrary. Thus, the questions that troubled the court of appeals in *Perry* are not present here, and petitioner's charge that the statute is "ambiguous" is without merit on this record.

2. Petitioner contends (Pet. 9) that the evidence did not prove "a nexus between the alleged kickback and the [f]ederal [c]ontract." That claim is also refuted by the record. The evidence established that petitioner solicited and received the kickback in return for a subcontract to produce special wrenches for the prime contractor's use solely in the construction of ships under a contract with the United States Navy (Tr. 11, 38-39, 249). Consequently, the "nexus" between petitioner's kickback scheme and the award of a subcontract on a project for the Navy was plainly demonstrated for the jury.[3]

3. Finally, petitioner contends (Pet. 10-11) that it was improper for the jury in its deliberations to listen to a tape recording that had not been played in open court. Petitioner did not, however, object at trial to inclusion of

[3]Contrary to petitioner's contention (Pet. 4), 41 U.S.C. 53 does not require the General Accounting Office (GAO) to inspect or audit government contractors; it merely provides that the GAO "shall have the power" to do so. See H.R. Rep. No. 212, 79th Cong., 1st Sess. 2 (1945). Thus GAO's decision not to inspect this transaction is of no help to petitioner.

the recording among the exhibits submitted to the jury; therefore his objection now comes too late. In any event, there was no error here.

The tape was properly admitted into evidence after it had been authenticated as a recording of the October 15, 1975, meeting at which petitioner received the kickback payment from Irwin (Tr. 219-221). See, *e.g.*, *Osborn* v. *United States*, 385 U.S. 323, 326-327; *United States* v. *Biggins*, 551 F. 2d 64, 66-68 (C.A. 5); *United States* v. *Iaconetti*, 540 F. 2d 574, 578 (C.A. 2), certiorari denied, 429 U.S. 1041; *United States* v. *Buzzard*, 540 F. 2d 1383, 1386 (C.A. 10), certiorari denied, 429 U.S. 1072. Moreover, petitioner was furnished with a transcript of the tape, which he used during cross-examination of government witnesses (Tr. 170-172, 202-205), and he now makes no claim that the tape was not exactly what it was purported to be or that it had been tampered with. The tape was in evidence, and it was within the discretion of the court to send it to the jury. See *Hamilton* v. *United States*, 433 F. 2d 526, 530 (C.A.D.C.), certiorari denied, 402 U.S. 985. Cf. *United States* v. *Carson*, 464 F. 2d 424, 436-437 (C.A. 2), certiorari denied, 409 U.S. 949. Since petitioner has no quarrel with the rule that a jury may generally take evidence to the jury room, petitioner's claim now is, in effect, that the government's failure to play the tape in open court amounted to a withdrawal of the tape from evidence. Petitioner cites nothing in this record or in the law to support such a novel contention. Furthermore, had petitioner perceived it to be to his advantage to play the tape in the jury's presence, he could have done so; his decision not to play the tape cannot invalidate the court's decision to allow the jury to take the

tape to the jury room, particularly when, as noted, petitioner failed to object to that decision at the time it was made.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

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[4]Petitioner's complaint (Pet. 11) directed to the court of appeals' summary affirmance of his conviction is also without merit. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 4.

DOJ-1978-03